

February 22, 1991

REPORT TO THE HONORABLE

MAYOR AND CITY COUNCIL

POWER OF THE CITY COUNCIL TO DELEGATE SUBPOENA POWER TO THE HUMAN
RELATIONS COMMISSION

During the course of the hearing before the City Council concerning the establishment of a Human Relations Commission, the question of the Council's power to grant subpoena power to the Human Relations Commission was raised. Councilmember Wes Pratt provided an ordinance of The City of Los Angeles establishing a Human Relations Commission for that City which granted subpoena power to its Commission.

Subsequently, the Council directed us to prepare an ordinance establishing a Human Relations Commission including provisions that would grant the Commission the authority to use subpoena power. In the interim, this office has thoroughly researched the propriety and legality of the matter. After reviewing the Charter of The City of San Diego, the State Constitution, the Charters for City of Los Angeles and City and County of San Francisco, the ordinances establishing a Human Relations Commission for Los Angeles and San Francisco, case law, statutes and other relevant authority, we conclude that absent an amendment to our Charter, the Council does not have either the express or the inherent power to delegate subpoena power to the Human Relations Commission. Our analysis follows:

THERE IS NO EXPRESS POWER TO
DELEGATE SUBPOENA POWER TO
THE HUMAN RELATIONS
COMMISSION

The Charter of The City of San Diego makes reference to the use of subpoena power in only two specialized cases. Section 14 authorizes the Council to use subpoena power when determining the proper qualifications of its own members. Section 128 authorizes the use of subpoena power for investigations of charges of misconduct of City officers or employees. There are no other references to the use of subpoena power in the Charter, either express or implied.

THERE IS NO INHERENT POWER TO
DELEGATE SUBPOENA POWER TO
THE HUMAN RELATIONS

COMMISSION

While it is true that the absence of any express grant of power in the City's Charter does not limit the Council's powers, this fact alone does not create an inherent power for the Council to delegate subpoena power to an advisory commission. Assuming that the Council's authority to use subpoena power is an inherent power not expressly provided in the City Charter, the Council would then have all of the rights, powers and privileges granted or prescribed by the general laws of the state pursuant to Charter Section 2.

State law grants a city's legislative body the power of subpoena in "any action or proceeding pending before it" under Government Code section 37104. (Emphasis added.) Government Code section 37105 provides further that the above-referenced subpoena "shall be signed by the mayor and attested by the city clerk." Enforcement of a subpoena under this Code section is predicated upon Government Code sections 37106 and 37107. Those sections provide that refusal to obey a subpoena may be reported by the Mayor to a judge of the Superior Court in San Diego County who can issue an attachment requiring the witness to appear before that judge. Government Code sections 37108 and 37109 provide further that the right of the witness to refuse to testify or fail to appear as ordered would then be within the jurisdiction of the Superior Court.

Although the foregoing Government Code sections have been in existence in one form or another since 1883, there is no record of an appellate court decision involving their application or use. Thus, on a related issue of the inherent power of the Council to use subpoena power in hearings before the Council itself there is no established precedent for guidance. Consequently, support for the immediate issue concerning the delegation of subpoena power to an advisory commission is even more tenuous.

Simply stated, the above-referenced Government Code sections limit the power of subpoena to the legislative body conducting actions or proceedings before it. They do not authorize the legislative body to delegate subpoena power to an advisory body appointed by the legislative body for specific purposes and to provide advice to it on those matters. In light of the foregoing, we conclude that under the Charter as it presently reads, the Council does not have the inherent power to delegate subpoena power to an advisory commission.

SUBPOENA POWER UNDER SPECIFIC GRANTS OF SUCH POWER IN

OTHER CITY CHARTERS

Article XI, section 5, subdivision (a) of the Constitution for the State of California provides that a Charter City "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters" This provision provides further that "in respect to other matters they shall be subject to general laws." Finally, this provision provides that with respect to municipal affairs, charter provisions "shall supersede all laws inconsistent therewith." Known as the "home rule" provision of our State Constitution, this section recognizes the autonomy over its municipal affairs enjoyed by a charter city.

Since the State Constitution fails to define the term "municipal affairs" as used in California Constitution, article XI, section 5, courts must decide under the facts of each case whether the subject matter is of municipal or statewide concern. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 57 (1969). *City of Fresno v. Pinedale County Water Dist.*, 184 Cal. App. 3d 840 (1986). The right to subpoena witnesses and documents concerning a matter pending before a commission created by the Council of a charter city has been found to be a "municipal affair." *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 236 (1976).

In *Brown* the charter for the City of Berkeley specifically granted subpoena power to commissions provided for in the charter. Noting this specific grant of subpoena power in the City's charter, the *Brown* court found that the charter provision authorizing subpoena power for commissions was not preempted by state law, specifically Government Code section 37104. *Id.*

In light of the foregoing, San Diego, as a charter city, would have the power to grant subpoena power to commissions provided for in the charter if the charter was amended to provide for this power. Los Angeles and San Francisco, both charter cities, have established Human Relations Commissions for their cities which specifically permit the use of subpoena power. The procedural requirements for the issuance, service and enforcement of the subpoenas used by the Human Relations Commission for each City differ dramatically. More importantly, however, the charters for each city expressly provide for the assignment of that subpoena power.

1. LOS ANGELES

Section 63, subdivision (2) of the Los Angeles Charter provides in pertinent part:

The Mayor, Controller, Treasurer and

City Council, and each board provided for in this charter shall have the power and authority to examine witnesses under oath and compel the attendance of witnesses and the production of evidence before them, respectively, as the case may be, by subpoena, to be issued in the name of said City of Los Angeles, and to be attested by the City Clerk of said City.

Section 63, subdivision (4) of the Los Angeles Charter further provides that "the Council shall . . . adopt ordinances providing suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify as herein provided."

Section 22.92 of the Los Angeles Municipal Code describes the powers and duties of the Los Angeles Human Relations Commission. It provides that the Commission "may compel the attendance of witnesses and the production of evidence before it by subpoena, when approved by the Mayor and the Council, to be issued in the name of the City of Los Angeles and to be attested by the City Clerk of said City." Section 22.92 provides further that refusal to obey the subpoena or:

 To answer any material and proper question, or to produce upon reasonable notice, any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor as provided in Section 11.00(m) of the Los Angeles Municipal Code for conviction of a misdemeanor thereunder.

2. SAN FRANCISCO

Section 3.701 of the San Francisco City and County Charter provides in pertinent part:

The mayor, the chief administrative officer, the controller, or any board or commission appointed by the mayor relative solely to the affairs under its control may . . . examine the books, papers, records and accounts of, and inquire into the conduct of any department or office

of the city and county, and for that purpose may hold hearings, subpoena witnesses, administer oaths and compel the production of books, papers, testimony and other evidence Any person refusing to obey such subpoena . . . shall be deemed in contempt and subject to proceedings and penalties as provided by general law in such instances.

Section 12A.5, subdivision (a) of the San Francisco Administrative Code provides in pertinent part:

In the performance of its duties under this subsection, the Commission, as permitted by law, may require, by, 'subpoena ad testificandum' setting forth the specific nature of its inquiry, the attendance and testimony under oath of any person directly involved in or concerned with discrimination within the scope of this ordinance whose presence and testimony is reasonably necessary to its inquiry;
. . . .

This section provides further that "the Commission may proceed to petition for a court order pursuant to Section 1991 of the California Code of Civil Procedure" when any person refuses to attend or testify as required by the "'subpoena ad testificandum' issued by the Commission." Section 1991 of the Code of Civil Procedure sets up an elaborate procedure for punishment of a disobedient witness for contempt.

CONCLUSION

Our research to date indicates no authority for the proposition that subpoena power may be granted to an advisory

body. Due to the significant impact of subpoena power on the lives of persons, public or private, we recommend that absent any ostensible authority, the ordinance be adopted as presented.

We shall continue our research in the matter and advise Council if we uncover any legal authority that supports a grant of subpoena power. Should the Mayor and Council desire to amend the Charter of The City of San Diego in order to grant subpoena

power to the Human Relations Commission, this office will assist in preparing the appropriate ballot language.

Respectfully submitted,

JOHN W. WITT

City Attorney

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Attachment

RC-91-11